THE SECRETARY OF COMMERCE
Washington, D.C. 20230

DEC 8 1999

J. Berry St. John
Craig Wyman
Liskow & Lewis
One Shell Square, 50th Floor
New Orleans, LA 70139

Toni D. Hennike
Mobil Exploration & Producing U.S., Inc.
3000 Pegasus Park
P.O. Box 650232
Dallas, TX 75265 - 0232

Ann Gillooly
Diane Gildersleeve
Mobil Corporation
3225 Gallows Road
Fairfax, VA 22037

Marc D. Bernstein
Amy R. Gilespie
Assistant Attorneys General
North Carolina Department of Justice
P. O. Box 629
Raleigh, NC 27602 - 0629

Re: Appeals of Mobil Oil Exploration and Producing Southeast, Inc. from Objections by the State of North Carolina to its Drilling Discharge Plan and its Plan of Exploration for Manteo Leases

Dear Counsel:

On September 2, 1994, Secretary of Commerce Brown issued a decision declining to override two objections by the State of North Carolina (North Carolina) to the proposed drilling discharges (PDD) and overall Plan of Exploration (POE) by Mobil Oil Exploration & Producing Southeast, Inc. (Mobil) at a site about 38 miles offshore North Carolina. Secretary Brown made the decision pursuant to section 307(c)(3) of the Coastal Zone Management Act (CZMA). Mobil challenged this decision in Federal Court as being arbitrary and capricious in violation of the Administrative Procedure Act (APA). On March 11, 1996, the Court ordered a stay of the litigation and remanded the matter to me for a determination whether the administrative record should be reopened to receive two studies, one on the impacts of Mobil's proposals on benthic resources and the other on socio-economic resources. Mobil, et al. v. Brown, et al., 920 F. Supp. 1 (D.D.C. 1996).

During this same period, Mobil and Marathon Oil Co. brought an action against the United States for restititution of rents and bonuses paid for the leases underlying the POE and PDD. Mobil argued that the passage of the Outer Banks Protection Act prevented it and Marathon from pursuing their rights under the leases. Marathon Oil Company v. United States, 177 F3d 1331

(Fed. Cir. 1999), petition for cert. filed, August 11, 1999. In addition, since 1995, several attempts to settle these matters have been initiated and failed.

I decline to reopen the record to admit the two studies at issue in Mobil v. Brown. Both this Department and parties to appeals under the CZMA have a strong interest in the finality of my decisions and the administrative process. Moreover, even were I to reopen the record to admit the two studies and reconsider my decision, I would still lack sufficient information to override North Carolina's objection. Thus, I am persuaded that the interest in finality should prevail over any interest the parties may have in supplementing the record. In light of this decision, I continue to encourage Mobil, North Carolina, and other interested parties to work toward resolution of North Carolina's need for additional scientific information about the impacts of Mobil's proposed projects on its coastal uses and resources.

Discussion

On September 2, 1994, Secretary of Commerce Ron Brown declined to override objections by the State of North Carolina (North Carolina) to the Plan of Exploration (POE) and the Proposal to Discharge Drilling Waste (PDD) associated with the POE submitted by Mobil Oil Exploration & Producing Southeast, Inc. (Mobil). The basis of North Carolina's objections was a lack of necessary information upon which to find the proposals consistent with its coastal management program. North Carolina specifically identified a need for the preparation of a four part fisheries study. In reviewing Mobil's appeals, Secretary Brown was required to determine whether the proposed projects were consistent with the objectives of the CZMA or necessary in the interest of national security. See 15 CFR 930.120, 930.121 and 930.130.

The 1994 decisions were based upon two administrative records that total approximately 10,000 pages of information. In spite of the quantity of material, certain information necessary to the decision was not provided by Mobil; specifically the record lacked information on: (1) the cumulative effects of Mobil's discharges; (2) the ecological effects of Mobil's discharges; (3) the effects on various fisheries of Mobil's discharges; (4) the effects on near-surface animals and planktonic resources of Mobil's discharges; (5) the effects of the discharges on benthic resources; and (6) the socio-economic effects of the POE. These information gaps precluded the conclusion that Mobil's POE and PDD "will not cause adverse effects on the natural resources of the coastal zone substantial enough to outweigh its contribution

to the national interest." 50 CFR 930.121(b).[1]

The question before me now is whether to reopen the record to admit the two studies and reconsider the prior decisions. I decline to do so.

First, this Department has an interest in the finality of its administrative processes. The regulations of the National Oceanic Atmospheric Administration (NOAA) implementing the CZMA provide for a Secretarial override procedure that includes the filing of technical information, briefs, federal agency comments and, if necessary, a public hearing. See, 15 CFR 930.125, 930.126, 930. 127, and 930.129. The regulations provide for extensions of time to be granted, normally in the amount of 15 days. 50 CFR 930.125(c), and 930.126(b). In the case of Mobil's appeals, the development of the administrative records was allowed to take eighteen months. The administrative records in both appeals were closed and reopened twice, finally closing May 29, 1992.[2] No request to hold the record open for pending research relevant to my decision was ever submitted by Mobil, North Carolina or any federal agency.

The two studies at issue were completed in March and September of 1993, long after the record closed in May 1992. Yet the studies were still not submitted until July 22, 1994. The studies were submitted by the Minerals Management Service (MMS) without any request to reopen the record or any opportunity for the parties to comment. Subsequently, through its lawsuit, Mobil v. Brown, Mobil urged the court to consider the benthic resources and

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[1] See, Decision and Findings in the Drilling Discharge consistency appeal of Mobil Exploration & Producing Southeast, Inc. from an Objection by the State of North Carolina, September 2, 1994, pp.40-41; Decision and findings in the Plan of Exploration Consistency Appeal of Mobil Exploration & Producing Southeast, Inc. from and Objection by the State of North Carolina, September 2, 1994, p. 33.

[2] The administrative record for the PDD was first closed on June 18, 1991. It was reopened at North Carolina's request on April 29, 1992, and remained open for one month as agreed by Mobil and North Carolina, closing for the second time on May 29, 1992, with the submission of Mobil's Supplemental Final Statement. All federal agency comments were received prior to the first closing of the record, including those of the Minerals Management Service dated, December 27, 1990, on the PDD and June 1, 1991, on the POE.

socio-economic impact studies in reviewing Secretarial decisions. Yet, Mobil never requested that I consider the studies during the pendency of its appeals. In fact, in its briefs to me, Mobil stated that the studies "are not even associated with the information issues at issue here."[3]

As provided in the CZMA regulations, consistency decisions are based upon the administrative record developed by the parties and all other interested agencies and members of the public. It is not practical or reasonable to reopen the record now to reconsider prior decisions in light of these two studies. Nor was it reasonable to do so in July 1994, six weeks before the release of the final decisions. Once the administrative record has closed and the decision making process begun, the record should not be reopened unless good cause is shown by the moving party and no prejudice will inure to the other parties. No such request, argument or showing was ever made in these cases. The receipt of these studies two years after the administrative records in these appeals closed, was untimely.

Second, these studies address only two of the six information gaps identified in the 1994 decisions. Were I to reopen the record to consider these studies, and if these studies were sufficient to address the need for analyses and site specific information on benthic resources and socio-economic impacts, there would still remain significant gaps in information necessary for me to override North Carolina's objections. Specifically, for the PDD, I would still lack information on: 1) the potential for bioaccumulation of heavy metals and other toxic substances; 2) a worst case analysis that accounts for cumulative impacts and related ecological effects; 3) impacts on near-surface and planktonic resources; and 4) the ecological functions of the Sargassum community. For the POE, I would still lack: 1) site specific information on fishery resources; 2) information on near-surface animals and planktonic resources, particularly as they relate to the Sargassum communities that harbor important resources for fish in their larval state; and 3) site specific studies on potential impacts to the fishery resource.

Without sufficient information to identify the adverse impacts of the proposed projects to the state's coastal resources, I cannot make the finding required by 15 CFR 930.121(b). The two studies at issue cannot, alone, address all the information gaps identified in my September 2, 1994, decisions.

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[3] See, Mobil's Supplemental Final Brief on POE at 11, and Mobil's Supplemental Final Brief on the PDD at 12.

For the foregoing reasons, I decline to reopen the record to include the two new studies and reconsider my decision in this matter.

Sincerely,

William M. Daley

cc: The Honorable Stanley S. Harris
United States District Court
for the District of Columbia